No. 15-278

IN THE

Supreme Court of the United States

AMGEN INC., *et al.*,

Petitioners,

v.

STEVE HARRIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF CERTIORARI

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Pursuant to Rule 37.2(b), The American Benefits Council (the "Council") respectfully moves for leave to file amicus curiae brief:

1. The Council is a nonprofit trade association that is composed of more than 300 organizations, primarily large plan sponsors, that either sponsor or provide services to privately sponsored employee benefit plans.

2. Collectively, the Council's members either directly sponsor or provide services to retirement and welfare plans that grant benefits to over 100 million Americans.

3. The Council often participates as amicus curiae in appellate cases that have the potential to affect the design and administration of benefits plans.

4. The petition arises from a Ninth Circuit decision involving an ERISA class action benefits claim challenging the plan fiduciaries' actions with regard to company stock investments in a defined contribution plan. Company stock investments lawsuits are among the largest claims, by dollar value, that could be made against a retirement plan.

5. Many of the Council's members sponsor plans that offer company stock investments and thus have a vested interest in this case and ensuring that the law develops appropriate standards for such investments.

6. The Council's brief provides unique perspective on the importance of company stock in our private retirement system and the potential negative impact of the decision on plan sponsors and fiduciaries, which are views that will be useful to the Court in evaluating the certiorari petition.

7. Pursuant to Rule 37, the Council gave timely notice to respondents' counsel that it would be filing an amicus brief and requested consent. Petitioners consented. Respondents did not reply but served a motion that they were waving their right to file a brief in opposition to the petition for certiorari.

WHEREFORE, this Court should enter an order granting the Council leave to file an amicus brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The American Benefits Council (the "Council") is a broad based non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council is primarily composed of large employers that sponsor employee benefits plans, but also includes organizations that provide services to such plans. Collectively, the Council's members either directly sponsor or provide services to retirement and welfare plans that grant benefits to over 100 million Americans.

The Council frequently participates as *amicus curiae* in appellate cases that have the potential to affect the design and administration of benefit plans. Many Council members sponsor retirement plans that, like the Amgen plan, offer their employees the opportunity to invest in their company stock. Accordingly, the Council and many of its members have a significant interest in the issues raised by this litigation.

Company stock liability is one of the most significant liabilities faced by private pension

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[1] Pursuant to Rule 37.2, *amicus* notified all parties of its intent to file an *amicus curiae* brief at least ten days prior to the due date for the brief. Petitioners consented. Respondents did not respond but filed a notice waiving its right to file a brief in opposition. *Amicus* has filed a motion for leave to file this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its members made a monetary contribution to this brief's preparation or submission.

plans and their sponsors. The Ninth Circuit's decision, which substantially misinterprets this Court's carefully balanced decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), is likely to disrupt employee benefit plans. If the Ninth Circuit's decision is allowed to stand, there will be no effective pleading controls to weed out meritless company stock claims. The decision also leaves fiduciaries in a quandary as to what appropriate action should be taken with a stock fund. The upshot is that employers are likely to react by eliminating company stock as an investment option in their pension plans, a result that would both frustrate congressional intent and foster retirement insecurity.

SUMMARY OF ARGUMENT

As this Court observed in *Dudenhoeffer*, congressional policy militates strongly in favor of pension plans offering company stock to participants. 134 S. Ct. at 2466. This policy is readily evidenced in the relevant statutory provisions, including numerous provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986 ("Internal Revenue Code") as well as the relevant legislative history.

This legislative policy has encouraged pension plans over the last forty years to include company stock holdings in their defined contribution plan architecture. Company stock holdings are important to those plans. The Employee Benefits Research Institute ("EBRI"), the leading non-partisan research

institute that produces original research on employee benefit plans and retirement services, estimates that current company stock allocations for individual accounts range from 14.2% to 24.4% among the plans that offer company stock as an investment alternative. Moreover, those plans are typically the largest employee benefit plans.

In *Dudenhoeffer*, this Court recognized both this congressional policy and the need to protect these types of plans from meritless claims in order to further this policy. Accordingly, the Court in *Dudenhoeffer* erected pleading hurdles by which district courts could dismiss implausible claims. By refusing to apply the pleading standards articulated in *Dudenhoeffer*, the Ninth Circuit has created substantial uncertainty for plan sponsors by exposing plans to easily filed meritless claims over defined contribution plan investments in company stock. If the decision is allowed to stand, plan sponsors will inevitably respond by restricting or eliminating company stock investments with the concomitant effect of frustrating congressional purpose and overall retirement security.

ARGUMENT

A. Congress Has Evidenced a Strong Intent Favoring the Offering of Company Stock in Retirement Plans

As this Court in *Dudenhoeffer* rightly commented, "Congress recognizes that ESOP's [Employee Stock Ownership Plans] are 'designed to invest primarily in' the stock of the participants'

employer, meaning that they are *not* prudently diversified. And it has written into law its 'interest in encouraging' their use." *Dudenhoeffer*, 134 S. Ct. at 466 (emphasis in original) (citation omitted).

Several statutory provisions in both ERISA and the Internal Revenue Code evidence this Congressional intent. From its enactment, ERISA exempted company stock held in pension plans from certain fundamental ERISA requirements. *Quan v. Computer Servs. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010), *abrogated on other grounds by Dudenhoeffer*, 132 S. Ct. at 2473. While plan fiduciaries, for example, must reasonably diversify investments to minimize losses, Congress exempted company stock holdings from this requirement. *Compare* 29 U.S.C. § 1104(a)(1)(C), *with id.* § 1104(a)(2). In addition, Congress exempted Eligible Independent Account Plans ("EIAPs"), which include ESOPs, from ERISA's ordinary requirement capping a plan's holdings of the employer's securities at 10%. *Id.* § 1107(b)(1). Under the statute, an ESOP is required to invest "primarily" in employer securities, meaning it could be totally invested in such holdings. *Id.* § 1107(d)(6)(A). The statute also exempts a plan's acquisition or sale of company securities from the per se prohibited transaction rules. *Id.* §§ 1106, 1108(e)(3)(A).

The Internal Revenue Code contains several provisions that mirror those provisions in ERISA and thus foster employee ownership of employer stock in pension plans. There is a tax deduction for plan sponsors contributing employer stock to ESOPs. *See*

26 U.S.C. § 404(a)(3)(A). There is a tax deduction for dividends paid on employer securities held on ESOPs. *See id.* § 404(k). There is favorable tax treatment for annual contributions. *See id.* § 415(c)(6). And there are income tax deferrals for sales of stock to ESOPs. *See id.* § 1042.

When court decisions interpreting fiduciary obligations in ESOP plans raised questions over this preferential company stock policy, Congress responded by strongly reaffirming its legislative intent in this area. In response to these court decisions and proposed regulations limiting company stock investments, Congress commented that courts should refrain from erecting barriers that interfere with the good of employee stock ownership through ESOPs:

> Congress is deeply concerned that the objectives sought by [the laws encouraging employee stock ownership plans] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.

Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520, 1590 (1976) (quoted in *Donovan v. Cunningham*, 716 F.2d 1455, 1466 n.24 (5th Cir. 1983)); *see also Quan*, 623 F.3d at 881 (noting that Congress has "expressed concern that regulations

and rulings which treat employee stock ownership plans as conventional retirement plans . block the establishment and success of these plans" (internal quotation marks omitted)); *Grindstaff v. Green*, 133 F.3d 416, 421-22 (6th Cir. 1998) (citing the Tax Reform Act and *Donovan*).

B. Company Stock Is an Important Component of the Defined Contribution Plan Landscape

This legislative intent has resulted in employee benefit plans acquiring large amounts of company stock and, in turn, company stock has become an important component to funding retirement income. EBRI, the leading non-partisan, non-profit research institute on employee benefits, has issued research reports that demonstrate the importance of company stock investments in the retirement landscape. As of December 31, 2013, the last available research plan year, EBRI's research found that although not all 401(k) plans offered company stock investments, such investments comprised 7% of all 401(k) plans. J. VanDerhei, S. Holden, L. Alonso, S. Bass & A. Pino, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2013*, at 21 Figure 20 (Dec. 14, 2014), http://www.ebri.org/pdf/briefspdf/EBRI_IB_408_Dec14.401(k)-update.pdf.

In those plans with company stock, moreover, participant allocations ranged from 14.2% of all assets to as much as 24.4% of all assets, depending upon age and income. EBRI's research was summarized in a table.

Figure 24
Average Asset Allocation of 401(k) Accounts, by Participant Salary and Investment Options
Percentage of account balances,[a] 2013

Salary[b]	Equity Funds	Target-date Funds	Non-Target-date Balanced Funds	Bond Funds	Money Funds	GICs[d]/ Stable-Value Funds	Company Stock
Plans With Company Stock							
$20,000-$40,000	33.4%	17.6%	5.5%	9.3%	5.7%		24.4%
>$40,000-$60,000	32.3%	20.7%	6.8%	9.1%	6.0%		19.0%
>$60,000-$80,000	33.3%	20.7%	6.5%	8.5%	6.2		17.9%
>$80,000-$100,000	39.1%	14.4%	8.9%	8.7%	6.9%		14.2%
>$100,000	41.3%	11.3%	7.3%	9.8%	5.7%		14.6%
All	36.9%	17.9%	4.8%	8.4%	6.5%		18.8%
Plans With Company Stock and GICs,[d] and/or Other Stable-Value Funds							
$20,000-$40,000	35.9%	7.3%	12.5%	4.7%	1.4%	15.4%	17.0%
>$40,000-$60,000	34.7%	6.8%	15.0%	5.1%	1.3%	16.0%	18.8%
>$60,000-$80,000	35.5%	6.7%	14.1%	5.2%	1.5%	16.1%	18.3%
>$80,000-$100,000	37.8%	6.3%	12.8%	5.3%	1.6%	15.3%	17.7%
>$100,000	39.5%	4.8%	10.4%	5.2%	2.8%	12.4%	18.9%
All	39.7%	7.3%	9.2%	5.3%	2.2%	15.2%	15.4%

Source: Tabulations from EBRI/ICI Participant-Directed Retirement Plan Data Collection Project.
[a] Minor investment options are not shown, therefore, row percentages will not add to 100 percent. Percentages are dollar-weighed averages.
[b] Salary information is available for a subset of participants in the EBRI/ICI database.
[c] A target-date fund typically rebalances its portfolio to become less focused on growth and more focused on income as it approaches and passes the target date of the fund which is usually included in the fund's name.
[d] GICs are guaranteed investment contracts.
Note: "Funds" include mutual funds, bank collective trusts, life insurance separate accounts, and any pooled investment product primarily invested in the security indicated.

(*Id.* Figure 24).

Other commentators have noted employer preference for making company contributions to plans in the form of company stock. As one

commentator noted, companies prefer to make stock contributions to defined contribution plans in lieu of cash because stock is much less costly than cash contributions. A. Munnell & A. Sunden, *401(k)s and Company Stock: How Can We Encourage Diversification?*, Center for Retirement Research at Boston College 6 (July 2002), *available at* http://crr.bc.edu/wp-content/uploads/2002/07/ib_9.pdf ("If the firm issues new stock [to the plan], it does not have to deplete its cash. . . . [E]mployers strongly prefer to make stock contributions to their 401(k) plans."). Employers also prefer company stock because it aligns employees' interest with the enterprise, which is an interest that Congress desired to foster through company stock. *Id.* at 6. The ability to make freely company stock contributions, particularly by younger companies that have limited capital to contribute to qualified plans, also arguably increases employers' overall abilities to contribute to defined contribution plans and, thus, benefits overall retirement security.

In light of these benefits to employers and Congress's intent, plans have invested significantly in company stock over the years:

> Participants' allocations to company stock remained in line with recent previous years. Thirty-five percent (or 9.1 million) of the 401(k) participants in the 2013 EBRI/ICI 401(k) database were in plans that offered company stock as an investment option (Figure 22). Among these participants, 74 percent held 20 percent or less of their

> account balances in company stock, including 54 percent who held none (Figure 34). On the other hand, 8 percent had more than 80 percent of their account balances invested in company stock.

(*VanDerhei, supra*, at 25).

The Ninth Circuit's decision disrupts these preferences. Given that our pension system is a voluntary one, sponsors are free to modify plans, including investment options offered by them *Cf. Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). If there is no certainty regarding the fiduciary standards for offering company stock or that courts will follow Congressional mandate by protecting fiduciaries from unwarranted claims, sponsors will inevitably respond by restricting investments in company stock. *See, e.g., Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) ("It is possible, though, for litigation about pension plans to make everyone worse off.").

These concerns are not hypothetical. Litigation over company stock has already had a deleterious effect on employee benefit plans. Since the initial wave of class action claims in the early 2000s, EBRI found that company stock investments in 401(k) plans had fallen by more than 60%. *VanDerhei, supra*, at 1. However, after federal courts formulated the *Moench* presumption, which substantially reduced those claims and gave some certainty to plan sponsors, EBRI found that plan company stock investments remained constant. *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). The *Amgen*

decision removes any semblance of certainty and will cause plans' investment in company stock to decline again.

C. The Ninth Circuit's Decision Frustrates the Congressional Intent Supporting ESOP Investments in Company Stock By Misinterpreting the *Dudenhoeffer* Decision

1. The Ninth Circuit Ignored *Dudenhoeffer*'s High Pleading Standards

In *Dudenhoeffer*, the Court struck a careful balance between fulfilling the Congressional intent that company stock be freely offered and protecting ERISA participants from fiduciary misconduct. Prior to *Dudenhoeffer*, federal courts had reached a consensus in light of the Congressional encouragement and the need to protect plan fiduciaries from meritless claims. Under this consensus, fiduciaries were entitled to a presumption of prudence that plan company stock investments complied with the statute. *See, e.g.*, 134 S. Ct. at 2466 (citing *Moench*, 62 F.3d 553 at 571; *Quan*, 623 F.3d at 882; *White v. Marshall & Ilsley Corp.*, 714 F.3d 988, 989 (7th Cir. 2013)).

This Court held in *Dudenhoeffer* that such a presumption was inappropriate because ERISA does not grant a special presumption to any class of fiduciaries. 134 S. Ct. at 2467. But the Court recognized that meritless litigation would frustrate Congress' unequivocal policy preference that employers freely offer company stock to its

employees. In so doing, this Court held that rigorous pleading standards enforced by Rule 12 motions were needed to ensure that meritless claims were weeded out. *Id.* at 2471.

Dudenhoeffer thus rightly limited the ability of plaintiffs to survive Rule 12(b)(6) motions in this area. While securities priced at market on a national exchange normally are entitled to a presumption that they are efficiently and fairly priced, this Court adopted a rigorous standard for claims contending that company stock was overpriced because fiduciaries had possession of inside information, requiring federal courts to scrutinize complaints and directing them to grant freely motions to dismiss where a complaint fails to meet this standard. *Id.*

Specifically, this Court held that such a complaint must "plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed more likely to harm the fund than help it." *Id.* at 2472. The Court emphasized that ERISA "does not require a fiduciary to break the law." *Id.* Moreover, courts must consider whether a fiduciary's action in either divesting company securities from the plan, "stopping purchases—which the market may take as a sign that insider fiduciaries viewed the company stock as a bad investment—or publicly disclosing negative information" could do "more harm than good to a fund." *Id.* at 2473.

Although the complaint in this case raises a *Dudenhoeffer* type claim—that is, a company stock claim alleging that the plan securities were overvalued because of insider information—the Ninth Circuit disregarded this Court's opinion in *Dudenhoeffer*. Following this Court's GVR, the Ninth Circuit decided not to remand the case to the district court for evaluation of the pleadings, but to review the pleadings itself. Even though the complaint contained no allegations that conformed to the *Dudenhoeffer* standard, the Ninth Court held the complaint was adequate.

In reaching this conclusion, the Ninth Circuit made two rulings that do not comport with this Court's holding in *Dudenhoeffer*. The court first ruled that this Court did not articulate any special pleading standard for company stock claims beyond those already in effect through *Bell Atlantic Corp. v. Twombly*, 550 U.S. 543 (2007), and its progeny. The court then ruled that securities disclosure requirements meant that the Amgen fiduciaries were obligated to disclose all information about the purportedly illegal activity alleged (failing to disclose adverse drug effects from a product) to participants. App. 37a-38a. These rulings, however, eviscerate the pleading standards that this Court articulated in *Dudenhoeffer*. *Dudenhoeffer* requires a plaintiff to allege far more—it requires plausible allegations that a prudent fiduciary "could not" have concluded that the alternatives would have done more harm than good to the fund as a whole.

Specifically, in the complaint in this case, Plaintiffs made no allegations that a prudent fiduciary in the same circumstances would have concluded that the plan's stopping of company stock purchases or publicly disclosing information would have benefited the plan rather than harm it. In fact, plaintiffs' complaint alleges that such an action would have further damaged Amgen's stock price and the plan because it would have sent "a negative signal to Wall Street analysts, which in turn would result in reduced demand for Amgen stock." App.15a

Meanwhile, the Ninth Circuit ignored plaintiffs' specific allegation that the Amgen plan's cessation of stock purchases would inevitably cause a decline in Amgen stock. Instead, the court simply reasoned that a freeze on plan purchases would likely not have "an appreciable negative impact on the share price" because of the "small number of Amgen shares" purchased by the plan compared to the market as a whole. App.40a. But that conclusion ignores this Court's warning in *Dudenhoeffer* about the adverse effect that a corporates insider's decision to cease purchasing corporate stock would have on the market as a whole:

> [L]ower courts faced with such claims should also consider whether the complaint has plausibility alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing

> negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.

134 S. Ct. at 2473.

The Ninth Circuit's error is significant. In this age of free information, the market would have an adverse reaction to a corporate sponsor's decision to suspend purchasing stock for its relevant plan. That decision would transcend the market and have deleterious effects on stock purchases, signaling a loss of confidence to the market as a whole.

Finally, the Court's opinion leaves fiduciaries to a plan with company stock investments in a quandary regarding what action should be taken. The court's opinion holds, in effect, that fiduciaries must examine and verify the company's securities filings and have to freeze stock investments or divest if there is any "arguable" violation or discrepancy. App.16a. In a scenario aptly described as "chaotic" by Judge Kozinski, the applicable fiduciary standard is transformed to one where fiduciaries must freeze plan company stock investments if *any* fiduciary has any disquiet or doubt from a situation from one where the plan and its fiduciaries are insulated from liability if no reasonable fiduciary could have concluded that there was a legitimate concern. *Cf.*, *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (requiring federal courts to defer to plan administrator's interpretation of plans). That turns fiduciary liability on is head, forcing fiduciaries to act on hunches or suspicions, rather than evidence.

2. The Ninth Circuit Ignored this Court's Warning in *Dudenhoeffer* Regarding Securities Liability Being Imported Into ERISA Claims

On the critical securities law point, the Ninth Circuit without any analysis, assumed and held that fiduciary liability could be predicated upon statements made in corporate securities filings. Circuit courts had unanimously held that securities filings could not give rise to fiduciary liability because such filings are made in a corporate, as opposed to fiduciary, capacity. *Amgen* erases that distinction and ignores *Dudenhoeffer's* cautionary language about importing such liability.

In *Dudenhoeffer*, this Court warned that the intersection of ERISA duties with the securities law is a complex issue that could place a fiduciary in an irreconcilable conflict. The Ninth Circuit ignored these concerns, simply assuming that ERISA fiduciaries had the same disclosure requirements as corporate fiduciaries under the securities acts. App.43a. It then held that the ERISA fiduciaries were obligated to make unspecified disclosures to participants, revealing the negative information without any consideration regarding whether they had this legal obligation or whether such disclosures conflict with the securities laws.

The Ninth Circuit's conclusion that ERISA fiduciaries have duties that are coterminous (or even *exceed* corporate SEC disclosure duties, as Judge Kozinski observed in dissenting from the denial of rehearing en banc) not only disregards this

Court's cautionary language in *Dudenhoeffer* but is flatly inconsistent with various circuit-level fiduciary liability decisions that remain intact after *Dudenhoeffer*. Every Court of Appeals has rejected the view that ERISA fiduciary liability may be predicated upon securities disclosures or omissions. *See, e.g.*, *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 257 (5th Cir. 2008); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1284 (11th Cir. 2012); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 143 (2d Cir. 2011); *Edgar v. Araya, Inc.*, 503 F.3d 340, 350 (3d Cir. 2007). The reason for this view is obvious: the securities statutes are detailed and mandate that disclosures be made by specified officers and directors acting in a corporate capacity at specific times. This structure makes no sense in the context of an ERISA fiduciary. *See, e.g.*, *Kirschbaum*, 526 F.3d at 257 ("[W]hen it incorporated its SEC filings into the Forms S-8 and 10a Prospectus, REI was discharging its corporate duties under the securities laws, and was not acting as an ERISA fiduciary.")

By holding that the complaint in this case stated a claim based upon the failure to disclose, and thereby suggesting that fiduciary liability could arise from such actions, the Ninth Circuit was imposing a disclosure duty upon ERISA fiduciaries, which was higher than those specified under the securities statute. *See, e.g.*, App.17a-18a (Kozinski, J., dissenting from the order denying rehearing en banc). As Judge Kozinski explained,

> The securities laws do not require continuous disclosure of all information that may bear on

> a stock price. Congress specifically rejected that route because of the enormous transaction costs and inefficiencies such disclosure would create. Instead, it enacted a comprehensive and tessellated statutory scheme for corporate disclosure that imposes obligations on certain corporate officers to reveal information at *specific* times.

Id. (citing 15 U.S.C. §§ 78m, 78o(d)).

The securities laws are specific in their disclosure requirements. To import securities disclosure requirements to ERISA fiduciaries as a premise for statutory liability is an unprecedented and impermissible extension of fiduciary liability.

This decision carries a high cost to the retirement system. The result of this decision is to place fiduciaries in an untenable position. Fiduciaries, who frequently are mid-level corporate employees without access to insider financial information will, under this decision, be responsible for the securities disclosures on behalf of the corporation. Indeed, as Judge Kozinksi logically observed, they will have a higher duty that transcends any protection or limitation placed on corporate disclosures by the securities laws.

One result, which would be disastrous for the private plan market, would be to force plans to retain professional fiduciaries. When it enacted ERISA, Congress deliberately departed from state trust law when it expressly permitted corporate sponsor employees to serve as fiduciaries. The reason was to encourage companies to adopt plans by limiting

costs. If professional fiduciaries are required, plan costs would dramatically increase, a cost that will be passed onto participants in the form of either higher costs or less retirement benefits because plans may not be offered due to costs and litigation risks.

3. The Ninth Circuit's Extension of *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), Contravenes *Dudenhoeffer*

Finally, when it extended *Basic* to fiduciary claims, the Ninth Circuit contravened this Court's warnings in *Dudenhoeffer* that courts should carefully navigate the intersection between securities and ERISA law. The Plaintiffs failed to plead any evidence of detrimental reliance, yet the Ninth Circuit simply extended *Basic* to hold that company stock plaintiffs could invoke the presumption of indirect reliance that securities law plaintiffs enjoy. The court offered no justification for extending this decision to ERISA holders, and it was error to do so.

The principal reason why *Basic* is manifestly inapplicable to this context is that most ERISA account holders do not actually buy or sell company securities based upon price. To the contrary, company stock is held for a variety of reasons, ranging from company loyalty to desiring to own a piece of the enterprise in which they are engaged. *See, e.g.*, L. Muelbroek, *Company Stock in Pension Plans: How Costly Is It*, http://pensions-institute.org/workingpapers/20p0205. In extending *Basic* to the fiduciary context, the Ninth Circuit significantly disrupted the delicate balance of this Court's ERISA jurisprudence and opened the

floodgates for litigation over company stock investments. As a result, plan sponsors will be less likely to offer company stock options, in contravention of Congressional intent, or—worse—be less likely to offer employer-sponsored benefit plans altogether.

CONCLUSION

This Court should grant the petition for certiorari and either summarily reverse the judgment or set the case for briefs and argument.

Respectfully submitted,

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